

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re

CASE NO. 18-50769 MEH 13

AMIR SAFAKISH,

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TRANSCRIPT OF AUDIO PROCEEDINGS

Pages 1 to 37

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TRANSCRIBED BY: Monyeen L. Black, CSR, CCRR, RPR, CRR
Certified Shorthand Reporter 10574

MBreporting
111 Deerwood Road, Suite 200
San Ramon, California 94583
(925) 989-6080

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3 THE COURT: Line item 8, Amir Safakish.

4 MR. TAHERIAN: Good morning again, Your Honor.
5 Sam Taherian for Amir Safakish, debtor, who actually is
6 present in the courtroom.

7 THE COURT: Who is the debtor?

8 MR. TAHERIAN: Beg your pardon?

9 THE COURT: Who is the debtor?

10 MR. TAHERIAN: Debtor is Mr. Safakish, who is
11 present in the courtroom behind me.

12 THE COURT: Okay.

13 MR. REHON: Good morning, Your Honor.

14 THE COURT: Hold on one second.

15 MR. REHON: Okay.

16 THE COURT: I'm sorry. I have been thinking
17 that it was Mr. Safakish. I didn't realize it was
18 Mrs. Safakish.

19 MR. TAHERIAN: No. It's Mr. Safakish, the
20 gentleman right there.

21 THE COURT: Oh, now I see you. Sorry. For
22 some reason I . . .

23 MR. TAHERIAN: Mrs. Safakish is here as well.

24 MRS. SAFAKISH: I have nothing to do with the
25 bankruptcy.

1 MR. REHON: We are all here.

2 THE COURT: All right, Mr. Taherian.

3 MR. REHON: And Peter Rehon on behalf of the
4 moving parties, Your Honor.

5 THE COURT: And I have parties on the phone?

6 MR. STEINBERG: Yes. Good morning, Your Honor.
7 Howard Steinberg of Greenberg Traurig appearing on
8 behalf of Morgan Hill Vineyard Owners Association.

9 MR. REHON: And, Your Honor --

10 MR. WUNSCH: And, Your Honor, John Wunsch on
11 behalf of Wells Fargo Bank.

12 MS. DUMAS: And, Your Honor, Nanette Dumas just
13 listening in for the trustee.

14 MR. REHON: And, Your Honor, I should also say
15 that Cindy Hamilton from the Greenberg firm is also here
16 and present in the courtroom on behalf of the
17 association, as is my client.

18 THE COURT: Okay.

19 All right. There are two matters that are on
20 calendar: The motion for relief from stay and the
21 motion to dismiss.

22 In reviewing them, what's the underlying issue
23 for everything here is that debtor filed this bankruptcy
24 to seek to reject the mediation agreement as an
25 executory contract. Debtor keeps saying it's an

1 executory contract on its face but has not provided any
2 analysis. So my question is do the parties agree that
3 it's an executory contract that's capable of being
4 rejected?

5 MR. REHON: We do not, Your Honor.

6 THE COURT: That's what I thought the answer
7 would be.

8 MR. REHON: And I also say, Your Honor, I
9 believe that's the association's position as well.

10 MR. STEINBERG: Yes, Your Honor. There's
11 absolutely no performance due on the association's side
12 at all under that agreement; so it's not an executory
13 contract.

14 THE COURT: Okay. So then -- so looking first
15 at the relief from stay matter. The underlying state
16 court action was initiated by the debtor. It, standing
17 alone, is not halted in any way by the bankruptcy
18 because debtor is plaintiff. To the extent there are
19 counterclaims, that -- any actions taken on those
20 counterclaims are stayed. So that's the only stay that
21 is in place at the moment.

22 Should debtor prevail on his desires in this
23 bankruptcy case, he will -- he will have filed the
24 bankruptcy; he will successfully reject the mediation
25 agreement; and then he will return to state court for

1 the litigation. Because there is no way that litigation
2 belongs in bankruptcy court.

3 So the question is should debtor be allowed to
4 reject the contract before or after it returns to state
5 court. The defense that's been provided numerous times
6 is that debtor has a right to reject an executory
7 contract in bankruptcy. That's premised on an issue
8 that has not been resolved and is key to the analysis as
9 to whether abstention or granting of relief from stay is
10 appropriate.

11 Similarly, the motion to dismiss, it's more
12 focused on the issues as to whether the debtor is over
13 the Section 109(e) debt limits. I have taken a look at
14 it. There's some mixed things going on. I have
15 questions. It's not a razor-sharp clear answer at this
16 point. So it strikes me that we just need to get to the
17 issue and determine if what the debtor seeks is actually
18 something that can be accomplished. Because that
19 determines whether this case belongs to stay -- as a
20 reason to stay in bankruptcy or not. So that's my
21 thinking. I'll let the parties respond.

22 MR. REHON: May I, Your Honor?

23 THE COURT: Yes.

24 MR. REHON: You are absolutely correct.

25 There's a dispute about whether it's an executory

1 contract. There's certainly been no analysis by the
2 debtor suggesting that there is any benefit to the
3 estate even if the contract is rejected. And I think if
4 we look at just the face of the agreement -- and make no
5 mistake, Your Honor, this was an agreement that was
6 reached. And also make no mistake, this bankruptcy was
7 filed not on the eve of trial; it was filed on the eve
8 of judgment, which I think is an independent basis why
9 relief should be granted.

10 But setting that aside and focusing just on the
11 executory contract issue. If you look at the face of
12 the agreement -- and there's no dispute of what the
13 terms of the settlement are. I don't think any credible
14 argument can be made by the debtor that the estate would
15 be better off rejecting that contract. There is just --
16 there is no basis for that if you look at the claims
17 that have been filed. And, again, I don't expect you to
18 do that analysis right here on the spot. But I want to
19 make that clear. Because the debtor hasn't even tried
20 to explain how that would be.

21 If the contract is rejected, it doesn't go
22 away. The debtor is in breach, and the parties would
23 still be able to enforce those material terms and get
24 damages from the debtor. The damages are significant.

25 And then the question, which I don't know the

1 answer to -- and Your Honor might, but I don't -- is if
2 the contract provides for the dismissal of the
3 underlying lawsuit, then -- and the contract is
4 rejected, does the underlying lawsuit have to be
5 rejected or can the debtor be allowed to proceed in
6 state court notwithstanding the fact. And I don't know
7 the answer to that.

8 THE COURT: So, in essence, your argument is,
9 one, is this an executory contract that can be rejected;
10 and if it is, what are the actual consequences of
11 rejection given the terms of the agreement?

12 MR. REHON: Right.

13 And there's the third prong which is Your
14 Honor's discretion and ruling as to whether or not the
15 debtor can reject it if, in fact, it is not in the best
16 interest of the creditors of the estate. And that's the
17 real hub. I mean, to me, that's one of the big issues
18 in this -- in this matter, because the debtor hasn't
19 explained why it would be -- why the estate would be
20 better off having him return to state court in pro per
21 prosecuting claims that don't amount to much of
22 anything. And even under his analysis, his damages
23 isn't very much. So he's much better off -- and the
24 creditors are much better off -- if the contract isn't
25 rejected. But we don't believe it could be rejected in

1 any event. And so that's really -- those are the
2 issues.

3 And I don't disagree with you in the sense that
4 nobody -- the debtor hasn't presented any credible
5 argument why this is an executory contract and why it
6 would be in the best interest of the estate. But the
7 consequences would be significant to the estate, and it
8 would be significantly bad for the estate and for the
9 creditors.

10 MR. TAHERIAN: May I, Your Honor?

11 THE COURT: You may. One second.

12 Are you finished?

13 MR. REHON: And I really want -- and that deals
14 with the executory contract issue, Your Honor. But I
15 think if you -- even setting that aside, if you look at
16 the Tucson Estate's factors and the debtor's
17 supplemental opposition, the debtor's supplemental
18 opposition is completely based on this executory
19 contract issue. And the debtor gives short shrift or no
20 shrift, doesn't even address some of the most material
21 of the Tucson Estate's terms. And one of the big ones
22 is forum shopping. This is exactly what the debtor did.
23 The debtor did this. And in Tucson Estates, the Ninth
24 Circuit gave weight to that and concluded that there was
25 likely forum shopping in that case.

1 So I think -- Your Honor, I think it would
2 still be appropriate to grant relief if only to
3 liquidate that claim. And if the debtor wants to return
4 to bankruptcy after the claim is liquidated -- again,
5 it's a state law issue -- then the Court can so rule.

6 Now I'm finished. Thank you, Your Honor.

7 MR. STEINBERG: Your Honor, may I be heard?

8 THE COURT: Yeah. Go ahead.

9 MR. STEINBERG: Thank you, Your Honor.

10 Just on this point. When the Court does its
11 analysis on this issue, Morgan Hill is a homeowners
12 association. And the only obligations arising out of
13 this mediation agreement relate to payment of monies to
14 Morgan Hill. Morgan Hill does nothing under this
15 agreement except receive money. So the notion that it's
16 an executory contract is Morgan Hill's [unintelligible].

17 Secondly, when I read the debtor's arguments
18 and papers, it sounds, to me, like he's conflating
19 rejection with termination of the contract as opposed to
20 a breach of the contract. And that's just not the law.
21 And so, you know, it's puzzling to me in terms of how
22 the estate is in any way prejudiced in any way, shape,
23 or form if the debtor's right to delay -- right to
24 reject is delayed of the consequence of the judgment
25 being entered by the state court. So, to me, the

1 argument doesn't make sense.

2 But I would like to get into the issue of the
3 merits of the motion to dismiss or convert. Because I
4 think the course of conduct that's gone on here is very,
5 very troubling, particularly when you look at the timing
6 of when things were done and the shifting around of
7 claims that were scheduled or signed under penalty of
8 perjury, claims that are secured and when accumulated
9 put the debtor over the 109(e) limit suddenly become
10 unsecured in such amounts so they are just under the
11 limits of 109(e) on the secured and unsecured once you
12 rejigger the numbers with no explanation as to why
13 claims that were secured become unsecured, why claims
14 that were unsecured become secured, why the dollar
15 values change given that these were signed under penalty
16 of perjury. It just does not pass any smell test
17 whatsoever.

18 And so I think, given the tardiness of the
19 filing, the timing of the filing, the failure to provide
20 any excuse to the Court for the delay in the filing were
21 the reasons for the changes. To me, [unintelligible] of
22 that phase and warrants dismissal of this action. This
23 is not an insolvent debtor. This debtor's assets are at
24 least three times, if not four times, higher than the
25 liabilities. So there's no reason given here as to why

1 this filing occurred, why it was necessary.

2 So I think the Court should strongly think
3 about dismissing this case, which would move the need to
4 address the rejection issue.

5 Thank you.

6 THE COURT: You're welcome.

7 Mr. Wunsch, you're just listening in or do you
8 wish to be heard?

9 MR. WUNSCH: Your Honor, I do not need to be
10 heard. Thank you.

11 THE COURT: All right. Thank you.

12 Mr. Taherian.

13 MR. TAHERIAN: Your Honor, does the Court want
14 me to address the motion to dismiss or the motion for
15 relief?

16 THE COURT: I want you to first address my
17 discussion about the executory contract.

18 MR. TAHERIAN: Okay.

19 THE COURT: And then address the others as
20 well.

21 MR. TAHERIAN: Very well.

22 On the executive contract, first of all,
23 counsel says, Well, there's no indication that its
24 rejection of the contract is beneficial to the estate,
25 therefore -- and I think counsel's arguing, therefore,

1 it's not executory. The two are confusing situations.

2 THE COURT: He's not arguing that.

3 MR. TAHERIAN: He says it's not to the benefit
4 of the estate. You know, Your Honor, it is to the
5 benefit to the estate to reject this contract because
6 the mediation agreement compels debtor to sell the
7 property. This property is used as a factory for
8 producing power supplies. If he loses that --

9 THE COURT: I thought this was a condo.

10 MR. TAHERIAN: It's a commercial condo.

11 THE COURT: It's a commercial condo. It's a
12 commercial condo in manufacturing?

13 MR. TAHERIAN: It's manufacturing, yes. It's a
14 commercial condominium in a commercial shopping center.

15 THE COURT: Wait a minute. There's a
16 manufacturing facility in the middle of a commercial
17 shopping center?

18 MRS. SAFAKISH: It's not a shopping center.

19 MR. TAHERIAN: It's a commercial structure,
20 Your Honor.

21 MR. SAFAKISH: Industrial. It's industrial.

22 MR. TAHERIAN: It's a commercial structure,
23 Your Honor.

24 UNIDENTIFIED SPEAKER: Industrial. It's
25 industrial. Industrial. Light industry.

1 MRS. SAFAKISH: No, it's not. It's --

2 THE COURT: Okay. Enough. Enough. Enough.

3 MR. TAHERIAN: It is --

4 THE COURT: So --

5 MR. TAHERIAN: It is --

6 THE COURT: So --

7 MR. TAHERIAN: So --

8 THE COURT: Commercial --

9 MR. TAHERIAN: It's separate --

10 THE COURT: It doesn't sound particularly
11 unique.

12 MR. TAHERIAN: It is unique.

13 THE COURT: So move forward. Your argument
14 is . . .?

15 MR. TAHERIAN: Well, they have --

16 THE COURT: Rejection is to the benefit of the
17 estate.

18 MR. TAHERIAN: They want to keep this property
19 to invest --

20 THE COURT: Then why did they agree to sell it?
21 You know what? That's actually not relevant.

22 MR. TAHERIAN: I'd be happy to discuss that.

23 THE COURT: It's not relevant for today so
24 don't. But it is the natural question that follows.

25 MR. TAHERIAN: I understand. And I have an

1 explanation. But that would get on us on a tangent
2 that's unnecessary today.

3 They have invested substantially -- the kind of
4 work that they do, industrial power supplies and so
5 forth, they have invested substantially in this
6 industrial-commercial. It's not a residential condo.
7 They have invested substantially. They lose it, they
8 lose what the building generates. ITA USA will lose the
9 ability to generate cash. So it's in the benefit of the
10 estate to hang on to this property.

11 Second, as far as whether it's executory or
12 not, Your Honor, on the face of the mediation agreement,
13 my client can choose to do nothing, in which case moving
14 party's compelled to buy this industrial real estate
15 from my client. And I can't think of a more clear
16 indication of an executive contract where one party is
17 obligated to buy out the other party's share. And he
18 doesn't want to sell his property to moving party. So
19 it's clearly an executive contract. He wants to hang on
20 to that industrial property.

21 Now, going back to the allegations of bad
22 faith. Moving party admits that this was filed on the
23 eve of a judgment. Moving party went to state court on
24 ex parte 24-hour notice to get a judgment entered. So
25 we had to move quickly. Now, the Court can take

1 judicial notice. Our firm never files skeletal
2 petitions. We had to do it this time and it --

3 THE COURT: So you filed a skeletal petition.
4 You get an extension of time to file schedules.

5 MR. TAHERIAN: And it still wasn't right. It
6 just threw a monkey wrench into how we do everything.
7 And this is probably the most complicated Chapter 13 we
8 have done, with properties in Japan, with liens in
9 Japan, debts to Japan, with bank accounts in the
10 Far East and Canada. And we had to go out and -- so we
11 had to go back -- the one thing that -- to argue
12 everything is suspicious, the one thing they can never,
13 ever argue -- they cannot argue -- is there's any
14 attempt to deceive or any attempt to get unfair
15 advantage. The original plan was a hundred percent
16 planned; the first amended plan was a hundred percent
17 planned; the second amended plan was a hundred percent
18 planned.

19 THE COURT: They are not worried about the
20 payout to creditors. The advantage that they are
21 arguing is rejection.

22 MR. TAHERIAN: Correct. But when they are
23 arguing that there's irregularities to the petition,
24 there's a reason why.

25 THE COURT: So let's address your amendments to

1 the schedule. This is as good a time as any.

2 So fill me in. I have looked at them and don't
3 quite understand some things.

4 MR. TAHERIAN: We added three corporations and
5 a sole proprietorship. A Japanese corporation, a Nevada
6 corporation, and a California corporation, those were
7 added in. We valued the Ferrari and we added in --

8 THE COURT: Most Chapter 13 debtors don't have
9 Ferraris.

10 MR. TAHERIAN: Most of them do not.

11 MR. SAFAKISH: He's not working for me.

12 MR. TAHERIAN: Most of them do not. Again,
13 this is the most difficult Chapter 13 we have done. So
14 we had these bank accounts from the Far East and Canada
15 we had to list.

16 THE COURT: So walk me through the schedule
17 changes.

18 So, for instance, why is Morgan Hill Vineyards
19 now listed as 134,000 secured and 134,000 unsecured?
20 What's the title debt and why is it split?

21 MR. TAHERIAN: I'd be happy to. Of course,
22 disputed claims count for 190 purposes. Although we
23 dispute the claim, we disclosed it.

24 Now, they argued they have Prefecture lien
25 rights. I dispute that. We disclosed Prefecture lien

1 rights exactly as stated.

2 THE COURT: What's the total claim?

3 MR. TAHERIAN: I think 270.

4 THE COURT: Why did you split it?

5 MR. TAHERIAN: Because they are arguing that
6 130,000 is Prefecture secured and the other remainder is
7 not; and we listened to what they said and gave it to
8 them.

9 THE COURT: Okay.

10 MR. TAHERIAN: Even though we dispute it, we
11 decided in interest of transparency we disclosed it.

12 THE COURT: Okay. So why did you remove
13 Japanese cities -- City of Prefecture lien?

14 MR. TAHERIAN: Well, it turns out -- under
15 Japanese law, this is not what we would call a lien by
16 American standards. It is back-due taxes converted to
17 U.S. dollars. That's the best number we have today.

18 THE COURT: Okay.

19 And why was Susan Safakish changed from 60,000
20 to zero? I'm just curious.

21 MR. TAHERIAN: That's disclosed with the state
22 of financial affairs. We discovered that Ms. Safakish
23 was paid off two days prior to the petition filing.
24 That's disclosed. Now, it's preferential treatment, but
25 it's completely inconsequential because it's

1 hundred percent claim.

2 MR. REHON: It was a \$110,000 preferential
3 payment.

4 MR. TAHERIAN: Completely inconsequential.

5 THE COURT: What's the relationship?

6 MR. TAHERIAN: Mrs. Safakish is debtor's wife.
7 Completely inconsequential. Has no consequence
8 whatsoever to any administration of the estate. Has no
9 consequence in the interest of the transparency. Once I
10 discovered it, I disclosed it.

11 Again, the Court could take judicial notice.
12 We don't do skeletal petitions. This threw -- moving
13 party's conduct threw a big monkey -- I can share this
14 with the Court. We had to put the horse before the
15 carriage. How we do things in our firm: We get initial
16 consultation, we give them a list of documents to bring,
17 we email them a draft of the petition, we ask them to
18 confirm, then we have them sign off. We had to do
19 everything backwards. We didn't have an intake sheet to
20 start with. That's why there's mistakes. Everything's
21 been cured. And none of the mistakes were
22 consequential.

23 Of particular importance, they make a big deal
24 that he didn't check off the box about being married.
25 Your Honor, there's no advantage to my client's lying

1 about being married or unmarried. No advantage. The
2 reverse is true. The reverse is true. If he's a single
3 man claiming to be married, it could enhance his
4 homestead exception. There's no advantage to gain.
5 There's nothing they could argue that he attempted to
6 gain any unfair advantage -- is just their conduct that
7 drove us into a skeletal petition of the most
8 complicated Chapter 13 case. I have never had a
9 Chapter 13 case with a Japanese corporation, Japanese
10 real estate, and a Ferrari and all that stuff.
11 Everything's before the Court. It's cured. I've got it
12 a hundred percent planned. So the motion to dismiss
13 should be denied with prejudice, Your Honor.

14 As far as the executive contract, I will offer
15 to brief it. We have to go back to state law on that
16 issue. But, I believe, on its face as an executive
17 contract, that my client is compelled to sell; moving
18 party's compelled to buy. That is an executive
19 contract.

20 THE COURT: Just a reminder to everyone.
21 Executory contract goes back to the Countryman
22 definition in terms of how you determine if there's a
23 lot of case law in the bankruptcy context, whether it's
24 an executory contract capable of rejection.

25 MR. TAHERIAN: And I've researched that. And I

1 haven't found anything exactly on point. So we have to
2 really develop this point of law.

3 THE COURT: Yes.

4 MR. TAHERIAN: And maybe use some analogies.

5 THE COURT: Both sides.

6 MR. TAHERIAN: Right. I welcome the
7 opportunity. The nerd in me loves this kind of stuff.
8 I welcome the opportunity to brief this, submit a big
9 brief on this. But today we've got a motion to dismiss,
10 which I think should be overruled, and a motion to
11 abstain, which I think should be continued.

12 MR. REHON: May I respond, Your Honor?

13 THE COURT: You may.

14 MR. REHON: Are you done?

15 MR. TAHERIAN: I am.

16 MR. REHON: Thank you.

17 Small points leading to a big point. We filed
18 an ex parte motion to set a hearing. We weren't seeking
19 a judgment on an ex parte basis. We were asking for
20 just a hearing date. And we tried to clear it with
21 Mr. Safakish, et cetera. So there was no imminent harm
22 to the debtor.

23 Secondly, the settlement, as counsel has --
24 well, the terms are what they are. But the -- one of
25 the material terms is that the debtor was required to

1 sell the unit on the open market. And all of the
2 proceeds would go to the creditors. So the -- and the
3 reason there is a provision that there would -- there
4 would potentially be a sale to the moving parties is
5 that if the debtor doesn't cooperate, doesn't do what he
6 is supposed to do and doesn't deliver on his promise to
7 sell on the open market, again, at the height of the
8 hottest real estate market we have seen in many years,
9 then he would have to sell it for a fixed price to the
10 moving parties. But the benefit to the estate is
11 absolutely clear if the contract is not rejected. All
12 of that money would go to the creditors.

13 So what he's proposing is rejecting the
14 contract and then going off in litigation to recover a
15 tiny, little bit of money for the creditors. So that
16 makes no sense. And there's no benefit.

17 THE COURT: So to be clear: He's not proposing
18 to fund a claim with litigation proceeds.

19 MR. REHON: That's true. But the point is, in
20 Your Honor's discretion -- well, I should say the debtor
21 has to show to reject -- even if it is an executory
22 contract, the debtor has to show that rejection would be
23 in the best interest of the creditors and the estate.
24 And here there's not even a question, I don't think, or
25 there shouldn't be a question that the debtor -- that

1 the estate would be worse off if the contract were
2 rejected.

3 But, in any event, one of the reasons -- and
4 it's interesting, the debtor says this is one of the
5 most complicated -- debtor's counsel says this is one of
6 the most complicated cases they've ever had. And the
7 reason is this debtor doesn't belong in Chapter 13.
8 Chapter 13 debtors -- Chapter 13 is designed for people
9 who are honest and unfortunate. And we can debate the
10 honesty of the debtor, but we cannot debate the
11 unfortunateness. He is very well-off. He does not
12 belong in this bankruptcy. He does not belong enjoying
13 the benefits and the fruits of a Chapter 13. And that's
14 the reason this case is so unusual because you never see
15 these cases. You never see a debtor with these
16 resources and so little debt before you.

17 THE COURT: Not in a Chapter 13. I've seen it
18 in others.

19 MR. REHON: And what it does, Your Honor, is it
20 underscores that this debtor is just gaming the system.
21 He is going to this forum to try to get some kind of
22 leverage and benefit over only one set of creditors who
23 are being sued by this debtor. And it's -- based on the
24 law and the equities and good faith, Your Honor, this
25 case should either be dismissed or at a minimum we

1 should be granted relief from stay so this whole fight
2 could go to state court where it belongs.

3 THE COURT: Mr. Taherian.

4 MR. STEINBERG: Your Honor, may I be heard?

5 THE COURT: One second.

6 Okay. Mr. Steinberg first and then
7 Mr. Taherian.

8 MR. STEINBERG: Thank you, Your Honor.

9 With respect to the dismissal consideration, I
10 heard Mr. -- I believe it was Mr. Taherian say that the
11 debtor has invested substantial amounts of money in
12 connection with the equipment for the commercial
13 condominium. But when you look at the debtor's
14 schedules, whether you look at the original one or you
15 look at the amended schedules, there's nothing listed in
16 terms of any kind of equipment or -- or [unintelligible]
17 anything; nothing is listed there as being owned by him.
18 So if it was a substantial investment, one would think
19 that there would be a reference to it in these
20 schedules. Perhaps -- giving him the benefit, perhaps
21 it's owned by one of the three corporations that he made
22 reference to that were just added to the amended
23 schedule.

24 But if you look at page 6 of the amended
25 schedules, the value of those entities is listed as

1 zero. And so the notion that there's, you know, all
2 sorts of value here or whatever doesn't stand up when
3 you scrutinize the schedule.

4 I also -- I heard the excuse of some sort of a
5 rushed filing. But I didn't hear Mr. Taherian explain
6 why there was a rushed filing with respect to schedules
7 that are done 30 days after the petition and why they
8 waited until after even the reply brief was done to file
9 amended schedules to come up with these numbers. And as
10 you alluded to, Your Honor, the City of Prefecture,
11 which was a \$200,000 secured claim, now becomes a
12 \$20,000 unsecured claim as just one example when you
13 compare the schedules.

14 Now, you know, there's plenty of case law that
15 says that when you sign something like schedules under
16 penalty of perjury and there's false information, I
17 mean, that's ground to bar discharge. So this is very
18 serious stuff. And I haven't heard anything proffered
19 in terms of how it is that you come up with these
20 significant variations and jiggering of secured versus
21 unsecured to try to fall within these parameters. I
22 would ask that you dismiss this case now. But if you
23 don't -- I heard Mr. Taherian say that he wants you to
24 dismiss our motion to dismiss with prejudice, which, to
25 me, is an affront. Because at a minimum if you're not

1 prepared to dismiss the case today, we'd certainly like
2 to have some discovery rights to understand why it is
3 that these numbers vary so much and whether or not this
4 individual's even eligible for Chapter 13 in the first
5 place. Because if he's not, this case doesn't belong
6 here.

7 And so the notion that you play hide the ball,
8 you don't amend your schedules until after all the
9 briefing is done, you don't timely file an opposition to
10 the motion to dismiss and then say "Ah-ha, I've got you"
11 just doesn't sit right. It's not the way that things
12 should be done.

13 Let me now turn to the stay relief. And what
14 Mr. Taherian is doing is conflating the Vannis' claim
15 with Morgan Hill. Morgan Hill is just a homeowners
16 association. All there is under that agreement is an
17 obligation to get paid money. There is nothing that is
18 done by Morgan Hill. Morgan Hill does not buy anything,
19 does not buy any property. It is just the homeowners
20 association.

21 And I have to tell you, it's quite a hardship
22 when no monies are coming in for a significant period of
23 time when there are expenditures here. So it's not an
24 executory contract. Rejection does nothing with respect
25 to the Morgan Hill claim. And so this should go back to

1 state court.

2 There's been no explanation that I can
3 understand with any case authority or any proper
4 citation to statutes or whatever else that demonstrates
5 how the debtor would be prejudiced if the -- the
6 mediation agreement is reduced to a determination by the
7 state court that it's an enforceable agreement and a
8 judgment is entered to that effect.

9 Thank you.

10 THE COURT: Mr. Taherian.

11 MR. TAHERIAN: Couple quick points. Counsel
12 points out that the ex parte notice was -- ex parte
13 notice in state court to set a trial at a hearing date,
14 not ex parte notice to have a judgment entered. But we
15 were stuck in a situation. We had 24-hour notice. They
16 were going to go ex parte and shorten time. We didn't
17 know how much time was going to be shortened. For all
18 we knew, they were going to go at 8:30 to state court,
19 get shortened time and get a hearing within hours or
20 within days, which is trial by ambush.

21 THE COURT: So the issue isn't the skeleton
22 filing?

23 MR. TAHERIAN: Correct.

24 THE COURT: The issue is the time after?

25 MR. TAHERIAN: Correct.

1 So our law firm, their --

2 THE COURT: Is it something new?

3 MR. TAHERIAN: We had no intentions, Your
4 Honor. We have a standard intake sheet; we didn't have
5 it.

6 Now, they are arguing, well, there's no
7 indication that investments were made in the subject
8 property. Now, Schedule B discloses USA ITA. And it
9 discloses that it's a California corporation, has assets
10 but liabilities exceed assets. So it has assets. And
11 we can provide a balance sheet of the corporation. It
12 has a lot of assets, just that the assets exceed the
13 liability -- the liability exceeds the assets. And
14 that's why the substantial investment in this property
15 is -- as far as debtor's schedule is concerned --
16 completely inconsequential.

17 Moving party argues that they -- one moving
18 party has no executory obligation. It was a global --
19 purports to be a global --

20 THE COURT: So continue your analysis.

21 MR. TAHERIAN: Of which one?

22 THE COURT: One moving party has no executory
23 obligation. So what's the analysis that follows?

24 MR. TAHERIAN: Well, clearly, one party has
25 obligations to buy the property. The mediation

1 agreement -- and contrary to counsel's representation, I
2 don't see anything in the mediation agreement that
3 compels debtor to list the property. It just compels
4 him to either sell it to him on market or sell it to
5 moving party. So my client could, under this contract,
6 sit back and invoke his right to have moving party come
7 in with cash.

8 Now, one other moving party argues, Well, we
9 have no executory obligations. But when you realize
10 this is a global mediation agreement, three parties, I
11 think this Court would be hard-pressed to do a piecemeal
12 relief or piecemeal abstention. It's an all-or-nothing.
13 And I think we should be given an opportunity to brief
14 that issue on whether or not a debtor with this kind of
15 a convoluted mediation agreement -- tri-party mediation
16 agreement has a right to reject it or not.

17 Moving party also argues that this is forum
18 shopping. And that is simply false. They confused
19 "forum" versus "subject matter." I brought that up. I
20 have no preference. I have complete faith in this Court
21 and the Santa Clara County Superior Court to hear my
22 arguments -- or debtor's argument. I have no preference
23 for forum. But the subject matter issue, this --

24 THE COURT: Then why not grant relief from
25 stay?

1 MR. TAHERIAN: Because the 664 relief which is
2 what they are seeking --

3 THE COURT: So you do have a preference?

4 MR. TAHERIAN: Not as to a forum; as to subject
5 matter. I don't want them to have the right to file a
6 664 motion. You know, I think I -- this Court --

7 THE COURT: You have no problem returning to
8 state court if you are able to reject the mediation
9 agreement first is what you're trying to say?

10 MR. TAHERIAN: I prefer this Court.

11 THE COURT: I'm never litigating that. So
12 under no circumstances am I litigating whether the condo
13 association fees are appropriate or not. There's no way
14 that has any impact on a Chapter 13 bankruptcy case.

15 MR. TAHERIAN: And if the Court decides that
16 this is -- the Court decides to grant relief without
17 664, without -- and grant relief to go back --

18 THE COURT: I don't know that I -- well, never
19 mind. I understand what you're saying.

20 MR. TAHERIAN: If that's the case, then I would
21 like -- because the right to reject an executive
22 contract is a congressionally granted right for this
23 debtor.

24 THE COURT: Again, I'm still getting to whether
25 this is an executory contract that's capable of

1 confirmation.

2 MR. TAHERIAN: I'd like to brief that issue.

3 THE COURT: So here's where I am.

4 MR. TAHERIAN: Uh-huh.

5 THE COURT: So here's where I am: As to the
6 motion to dismiss, at this point it's not clear to me
7 that there's a clear Section 109(e) violation such that
8 dismissal is required. There's an argument for bad
9 faith filing and that it should be dismissed. The
10 Levitt factors are the four factors that normally come
11 into play. Two of them are definitely applicable.
12 Whether debtor only intended to defeat state court
13 litigation, clearly applies and argues in favor of bad
14 faith. Debtor's history of filing some dismissals, also
15 applicable in that there are no prior filings and
16 dismissals. So they weigh against each other.

17 The question of whether egregious behavior and
18 whether debtor has sought to -- really question is
19 whether debtor has sought to unfairly manipulate the
20 bankruptcy code. I think this comes again to is this an
21 executory contract. So I think the only way -- so given
22 that, I'm not prepared to grant the motion to dismiss
23 today. I can dismiss it -- I can deny it without
24 prejudice or I can continue it to trail further
25 proceedings. I am assuming that moving parties would

1 prefer to trail rather than have to refile.

2 MR. REHON: We would, Your Honor.

3 THE COURT: Similarly, with the relief from
4 stay, which is really seeking abstention, it all depends
5 on whether this is an executory contract that can be
6 addressed in the bankruptcy case. So I think I do have
7 to require the parties to tee up and address that, the
8 executory contract issue of whether the mediation
9 agreement is an executory contract that can be rejected
10 in bankruptcy.

11 Question two is, if so, what does the rejection
12 look like; what is the impact; and what are the --
13 what's the outcome of rejection.

14 Third, the parties are welcome to address
15 whether rejection's in the best interest of the estate.
16 Truthfully, that's not a -- normally, that's not a
17 determinative factor as long as creditors are going to
18 be paid. Here it's a little different because the issue
19 is actually not with payment under the plan but
20 rejection. You're welcome to address it. I think the
21 first two questions are the key issues.

22 There are two ways to get this before me. You
23 have -- the debtor has proposed rejection of the
24 executory contract through the plan. I can set it for a
25 contested confirmation hearing on that issue and set a

1 briefing schedule, or I can require the debtor to file a
2 motion to reject the contract. Either way, you're going
3 to have a briefing schedule.

4 Time needed preference -- and, furthermore, let
5 me say, Ms. Dumas, I believe there are other objections
6 to the plan pending; is that correct?

7 MS. DUMAS: Your Honor, let me check. I'm not
8 a hundred percent sure that there are. Let me just --

9 THE COURT: It actually may have been so
10 recently filed, it may not be. So I'm looking at a
11 contested confirmation hearing on that limited issue.

12 Time?

13 Go ahead.

14 MR. STEINBERG: Your Honor, I know Wells Fargo
15 filed an objection to the plan. And I also know that if
16 you add up the payments in the plan -- the second
17 amended plan that are proposed, they don't come close to
18 paying off the amount of the debt. So on its face, it
19 doesn't work mathematically. But I think it would be
20 better off to tee up the issue of this rejection issue
21 before we get into further complicated issues of
22 confirmation. Because there are a number of other
23 issues that are ripe with respect to confirmation such
24 as good faith, et cetera, that we'd like to explore if
25 it's going to go down that route. So I think it would

1 be more efficient if we could just focus on this one
2 issue and then deal with confirmation later.

3 THE COURT: I agree. This, in essence,
4 depending on the outcome of this question, determines
5 whether this case is going any further here.

6 MR. TAHERIAN: Very well.

7 MS. DUMAS: And, Your Honor, just looking at
8 the trustee's objection filed on May 17th. And it just
9 really boils down to pay advices. So there's nothing --
10 no burning issues from the trustee's point of view.

11 MR. WUNSCH: Your Honor, on behalf of Wells
12 Fargo Bank, we do have an objection as to the treatment
13 of the secured claim. And I believe if the planning --
14 amended one would have to be amended further to deal
15 with that. But it does make sense to hold that off
16 until the other issues are determined.

17 THE COURT: Okay. Thank you.

18 Do you want to set a contested confirmation or
19 do you want to tee it for motion?

20 MR. TAHERIAN: I think it's better to tee up a
21 motion. This is just one --

22 THE COURT: Then it's a cleaner, single issue.

23 MR. TAHERIAN: Uh-huh.

24 THE COURT: Okay. When do you want it to be
25 heard?

1 MR. REHON: Well, Your Honor, I would only ask
2 that it be done as soon as possible.

3 THE COURT: Normally, this -- this is the
4 motion that normally requires a 28-day notice period.
5 Frankly, I think all parties are going to want it for
6 the briefing schedule.

7 MR. TAHERIAN: 28 days, so that would put us in
8 mid-July?

9 THE COURT: It would. It would be a hearing
10 mid-July from when you file it. I assume you don't have
11 it ready to file today?

12 MR. TAHERIAN: We do not have -- we do not have
13 a motion to file.

14 THE COURT: So available dates I have for
15 hearings are August 16th, August 23rd, August 30th, or
16 September 6th.

17 MR. REHON: Was the first date the 15th?

18 THE COURT: It's August 16th, actually.

19 MR. REHON: 16th, okay.

20 MR. TAHERIAN: Your Honor, I have to have
21 surgery late August, mid-August. I don't know what the
22 date's going to be; and then after I have to do
23 chemotherapy. I have Stage II cancer. It's under
24 control. It was caught early. I'm getting excellent
25 care. The radiation, first round chemo were good, but

1 the tumor's not removed. It's very, very high recovery
2 rate. But I have to do a surgery, have to have it
3 removed in mid-August, late August. I cannot -- on this
4 topic, I'll let the Court set a schedule.

5 THE COURT: I'll tell you what I will do. I
6 will let the parties meet and confer on a hearing date
7 and a briefing schedule.

8 MR. TAHERIAN: Very well, Your Honor.

9 THE COURT: So once you've done that -- and I'm
10 very sorry, and I wish you a very fast and healthy
11 recovery.

12 MR. TAHERIAN: Thanks, Your Honor.

13 THE COURT: Email Ms. Burtle [phonetic] with
14 the proposed hearing date and schedule, and we will work
15 with that.

16 MR. TAHERIAN: Thank you, Your Honor.

17 MR. REHON: We will do that, Your Honor. Thank
18 you.

19 THE COURT: Thanks.

20 So both the relief from stay and the motion to
21 dismiss are going to continue to whatever the hearing
22 date we set on that confirmation. Okay?

23 MR. TAHERIAN: Your Honor, could the Court make
24 available an audio of this hearing?

25 THE COURT: Yes, it will be on the docket

1 tomorrow.

2 MR. REHON: That would be great. Thank you,
3 Your Honor.

4 THE COURT: Thank you.

5 MR. REHON: Appreciate your time.
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